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AUTHOR Hanna, Glenda
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ABSTRACT

This paper reviews aspects of Canadian and U.S. law related to liability and negligence of outdoor programs and suggests strategies for risk management. To prove negligence, an individual injured in an outdoor program must prove that the outdoor leader had a duty of care to the participant, standards of care were breached, actual injury was suffered, negligence was the proximate cause of injury, and the participant's position was not prejudiced. Court cases considering the criteria of customary standards of care within the profession of outdoor leadership have focused on specific areas of leadership responsibility: leader qualifications, outdoor navigation and guidance, group supervision, instruction in activity skills and safety, and provision of adequate safety measures. Outdoor leaders seek adequate risk to stimulate participants while avoiding likely accident-precipitating situations. Five ways to deal with real risk in outdoor program situations are planned retention of risk after due consideration, risk reduction through safety equipment or procedures, avoidance, transference through insurance, and transference through waivers. When a participant is injured, the leader can minimize lawsuit potential or cost by caring for the victim, having someone take copious notes, contacting the agency director immediately, avoiding contact with the media, and settling out of court. A program agency can protect itself most effectively by developing a comprehensive risk management plan, carrying liability insurance, and having participants sign waiver forms. (SV)

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Risk Management and Litigation Avoidance in Outdoor Recreation Programming

Glenda Hanna, Ph.D.
University of Alberta

Abstract—This session, involved the author and Mr. James Moss, a Denver trial attorney, in a joint session designed to share recent examples of United States and Canadian court decisions illustrating trends in outdoor recreation related litigation. The emphasis was placed on the avoidance of accidents and exposure to resultant litigation through the development of comprehensive risk management programs. Similarities and differences between American and Canadian judicial interpretations of the expected standards of care, support for waivers, and other elements became evident over the session. This article will review the case law as it relates to this area of negligence law in Canada and the United States. It will discuss the legally defined duties of outdoor recreation leaders in Canada, risk management strategies, and recommendations to reduce the potential for an accident resulting in litigation or of such litigation succeeding.

The Criteria for Negligence

An individual injured in an outdoor recreation program situation in Canada must demonstrate the following:

Duty of Care

The presence of a relationship between the outdoor leader and the injured participant. This one's usually easy; leader + participant = relationship.

Standard(s) of Care Breached

The omission of something the reasonable outdoor leader would have done or the commission of something the reasonable outdoor leader wouldn't have done (and/or reasonable parent in the case of a minor participant).

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Actual Injury Suffered

Evidence of a physical and/or psychological injury must be presented. A leader can't be sued for burning the group's dinner, thank God!

Negligence the Proximate Cause of the Injury(ies) Sustained

Implies a test of foreseeability; the likelihood of injury and its potential gravity vs. the activity utility (social benefit) and cost of reducing the risk.

Participant's Personal Position not Prejudiced

The absence of assumption of risk (because a) the risk was inherent to the activity, or b) a binding waiver form was signed), or contributory negligence, where the participant failed to meet the standard of care the individual owed him or herself.

Outdoor Leader Responsibilities - The Issue of Standard of Care

In considering the criteria of the standards of care customary within the profession of outdoor leadership, and particularly those which have been recognized through the courts, a number of specific areas of responsibility of outdoor leaders have emerged. These include the obligation to be qualified to lead people outdoors, to navigate and guide safely, to supervise program participants, to instruct participants in the activity, and to provide adequate safety measures to support the program. In this section, I will illustrate each of these areas of responsibility using Canadian case examples.

Leader Qualification

The public or private agency employing an outdoor leader and the leader him or herself must be confident that the leader is qualified. Qualification may be defined as possessing the technical knowledge and skill, physical fitness, age and maturity, experience, judgement and leadership or other certifications deemed essential by law and custom to do the job safely and effectively.

In the Ontario case of *Moddejonge v. Huron County Board of Education* (1972), 2 O.R. 437 (Ont. H. Ct.), an outdoor education coordinator was found negligent for allowing a number of students who could not swim to wade in an unmarked pond area with a steep drop-off of irregular outline. Two students drowned when one girl, who could swim, attempted to rescue the second of two non-swimmers who had slipped off the drop-off. The coordinator himself, holder of master's degree in outdoor education, was a non-swimmer. As a non-swimmer untrained in lifesaving, he was neither qualified nor certified to be placing himself in the role of lifeguard.

Navigation and Guidance

Natural terrain (forests, mountains, rivers, etc.) is typically the environment of choice for outdoor recreation and education programs. Recognizing all of its variety and unpredictability, this environment dictates that the outdoor leader select a route appropriate to the group's objectives and preparation. The ability to match a group's ability with the demands of a particular activity and route is a skill which requires training and practice and is not one which should be left to the vagaries of luck. In addition, the leader is responsible for keeping the group together and for helping each member of the group learn to pace themselves toward this end. This reflects the need for group guidance, which includes skills such as managing the group, keeping them on their itinerary, ensuring no individual is overstressed by the demands of the activity and environment, and helping solve problems which may arise.

Finally, in addition to the necessity for excellent map and compass skills to ensure the group doesn't end up lost, the outdoor leader has a duty to assess risks inherent in the selected environment and determine an appropriate management strategy for these risks.

The recent case of *Lowry et. al. v. Canadian Mountain Holidays Ltd. et. al.*(1985), 33 C.C.L.T. 261 (B.C.C.A.); (1987), 40 C.C.L.T. 1 (B.C.C.A.), supported at appeal, clearly indicates the need for great care in areas with inherently hazardous terrain. This case involved a fatal heli-skiing avalanche accident in the Purcell Mountains, when eight of ten members of a heli-skiing party were caught in an avalanche and three died as a result. The families of the deceased sued the operator, contending that the defendants negligently conducted their heli-ski operation "in an area, and at a time when ... the danger of serious avalanches was readily predictable." Recent storm activity, the steep (48 degree) slope, slope aspect (lee), existing avalanche activity on similar slopes, recognized avalanche slopes above the ski run, and the snow layer profile all indicated high avalanche potential on the run which inevitably slid. In deciding in favor of the plaintiffs, the courts surmised that a reasonably prudent guide would have considered the above factors and dug the appropriate snow profile test pits and that such a guide "would never have taken the group on a traverse... where the guide in question did." This case sets an onerous precedent for heli-ski operators, and other outdoor leaders with respect to navigation and guidance and will hopefully result in increased time and thought being devoted to sound route selection.

Supervision

Supervision refers to the general duty to oversee the participants from the time the outdoor leader assumes responsibility for them until the program is complete and the leader and group part company. In the interim, the degree of supervision administered by the leader varies, as it is neither essential nor feasible that the participants be watched every minute of the day. Factors affecting the tightness of supervision required include: the nature of the activity, the real risk present in the situation, and the age, experience and technical expertise of the participants themselves.

In the 1981 B.C. decision of *Sholtes v. Stranaghan* (1981), 8 A.C.W.S. (2d) 219 (B.C.S.C.), an experienced outdoorsman employed a professional guide to accompany him on hunting, fishing and animal photography expeditions. Although the guide always escorted the client on hunting outings, he did not always go on his fishing and photography excursions. When the client plaintiff was mauled by a grizzly bear while on a photography outing, he tried to claim damages against the guide for failing in his duty to care for him by allowing him to be out in the wilds alone. The courts dismissed the action and held that the guide's standard of care depended upon the knowledge and experience of the person who hired him. In this case, he was justified in permitting the experienced client to pursue a low care activity (photography) without his direct supervision.

It's good to know such cases can be successfully defended, but leaders need to be aware that the finding could have been very different with participants who lacked the maturity and experience of the particular client in this case. Program supervision, both general and specific, is necessary where participants are attempting skills for the first time or practising inherently dangerous activities where foreseeable accidents may result in serious injuries.

Instruction

Virtually all outdoor leaders are involved as instructors, if only through the example they set for their participants. Those who function as outdoor activity instructors must, in addition to the activity skills, teach some of the safety related theory involved in the activity. For ex-

ample, those instructing river canoeing should also teach basic river reading, paddle and whistle signals, and river rescues. Instruction will include the provision of warnings to participants with respect to inherent risks involved in the activity and the environment to the extent that the participants understand and appreciate them and can assume some of the responsibility for accepting them.

Perhaps the most essential concern with instruction is that it be progressive within and between skills taught and in environmental challenge. In addition, time must be allowed for each student to safely master one progression before going on to the next. Unless special alternatives are allowed (i.e., extra instructors or sessions, terrain selection variety, etc.) then the group may only progress as fast as its slowest members.

An illustration of the importance of a number of these elements of instruction can be found in the facts and findings related to the decision in *Smith v. Horizon Aerosports Ltd. et. al.* (1981), 130 D.L.R. (3d) 91; (1982) B.C.D. Civ. 3391-01, where a sport parachuting student was rendered a quadriplegic as a result of an accident which occurred while she was participating in a course offered by the defendant. Near the end of a short four hour introductory session, the plaintiff and her class were taken up in a plane to attempt their first jumps. The plaintiff, although visibly anxious, was permitted to make her jump. She mentally froze as soon as she left the plane, forgetting all of her previous instruction. As a result, she failed to steer the canopy to the safe landing area and instead landed in a tree, fell to the ground and broke her back. Some of the factors used in attributing negligence to the defendant school included the instructor's failure to adequately describe and discuss a number of elements of the upcoming jump, resulting in the plaintiff lacking confidence in the procedure and being resultantly overstressed by the situation. The judge felt that the short nature of the course "puts on those who teach it a heavy onus to ensure that each individual novice has learned well enough to jump safely."

In addition, while no overt competition was present, the peer pressure which inevitably develops in such situations results in a duty to "tell an alarmed student that she does not have to jump and that no one will think the worse of her if she declines." In fact, this court felt that it was the jump master's duty to prohibit any jumper who he or she felt was not physically and emotionally in a condition to exercise clear and quick judgment even if the jumper felt personally ready to proceed.

In brief here, an outdoor leader has the foremost general instructional duty to progressively teach participants the activity and while doing so, he or she must determine that each participant has the intellectual, physical and emotional capability to perform at a safe level, the progressions taught. If not, perhaps lesson adjustments are indicated.

Provision of Adequate Safety Measures

The final category of responsibilities, integrally related to all others discussed, are those varied but essential duties collectively considered safety precautions. Leaders should know their participants' general and specific propensities, especially where participants are children or the mentally infirm and should create and enforce the necessary rules and regulations to facilitate organization and control of the group. Equipment must be adequate, including items necessary to participate in the activity and any safety and rescue equipment deemed essential by custom or circumstance.

The importance of attending to the provision of adequate safety measures was illustrated in the case of *Michalak v. Govenors of Dalhousie College and University* (1983), 61 N.S.R. (2d), 374. In this case, an eighteen year old student suffered a serious back injury when she lost her grip on the 'Tarzan-Swing' rope she was swinging on as part of a high

ropes course. While still attached to the main rope by a waist belt, the inverted position she assumed when she inadvertently let go of the rope caused her to hit the ground with her back resulting in a compression fracture of her thoracic vertebrae. She sued the defendant, Dalhousie University, for failing in its duty to care for her, and while the appeal court lowered her damages substantially (due to her substantial recovery between trials), both courts agreed that she was justified in her claim on four grounds:

1. A full body harness should have been used.
2. The ropes should have been checked after each swing.
3. The course was too advanced for beginners.
4. Inadequate instruction was given the students.

While the latter two criteria relate to the duty to instruct participants carefully, the first two are direct examples of a perceived deficiency in the provision of adequate safety measures. Outdoor leaders and programming agencies should note their responsibilities to develop a set of emergency procedures to effect in the event of an accident and to provide appropriate, quality equipment, suitably sized to each participant where relevant. With current technology, vast innovations and improvements have been made in the types and designs of various pieces of lightweight, compact lifesaving equipment used in most activity pursuits. For example, the wilderness high country ski leader of today would be expected to provide or require all participants to bring such items as electronic transceivers, avalanche probe poles, shovels and a first aid kit.

Liability of Outdoor Recreation Delivery Agencies

An individual injured during an outdoor recreation program may claim damages based on a personal fault of the agency (e.g., insufficient leader/participant ratio, occupier's liability, etc.) or on the vicarious liability the agency has for the errors or omissions of its staff. The principle of vicarious liability is supported by the courts because the agency receives the benefits/profits of the program and it is typically the insured entity and so better able to bear the costs of such losses. Therefore, as long as the agency has organizational control of the program and the leader is operating within the scope of their employment, the agency will be held responsible for them.

Risk Management Strategies

Outdoor leaders are constantly engaged in seeking adequate risk to stimulate participants while avoiding likely accident precipitating situations, and they must practise a variety of appropriate techniques for handling objective risks. The outdoor programming agency and leader will be responsible for assessing risks to each participant of various elements of the program. This information will be used as the basis for determining the appropriate strategic approach to dealing with each identified risk.

In considering the alternatives available, there are basically five ways to deal with real risk in outdoor program situations: retain, reduce, avoid, transfer through insurance or transfer through participant assumption:

Retention

While probably the most common method of approaching risk, it is important that the decision to retain a given risk is planned and intentional and not the involuntary result of a lack of consideration of the risks. An example of risk retention would be intentionally deciding to backpack in an area known for its variable weather.

Reduction

A loss reduction approach involves the employment of safety equipment and/or procedures which may reduce either the frequency and/or potential severity of accidents. For example, requiring cross-country skiers to wear glacier glasses above tree line may reduce both the incidence and potential severity of snowblindness.

Avoidance

Avoiding a risk involves making a conscious decision not to accept the specific risk present at that particular time. Portaging around an oft-paddled rapid when the river is in flood and the group is inexperienced is an example of the wise employment of this method.

Transference Through Insurance

In most, if not all outdoor programs, there are a variety of risks which are perceived as undesirable but largely unpreventable in the drive to achieve program objectives. These are the risks which, while occurring infrequently, may be quite catastrophic in their consequences. An example inherent in most camping situations is the risk of a serious burn, either from a campfire or gas fueled appliance (such as a stove or lamp). These risks are best covered through insurance.

Transference Through Waivers

Where participants are informed, consenting adults, there are a number of high risk activity situations where they must be prepared to personally assume the risk of participation. This may be legally achieved through the use of responsibility release contracts (waivers). The people who choose to climb Mount Everest or do other high risk activities at environmental extremes must be willing to accept great objective risks inherent to participation at that level. The use of waivers has been extended over recent years to cover a wide variety of risks, not necessarily restricted to those in the extreme range (Hanna, 1991).

Signed waiver forms have held up in Canada, all the way to the Supreme Court of Canada (*Dyck v. Manitoba Snowmobile Association Inc. and Wood* [1985] 4 W.W.R. 318; 32 C.C.L.T. 153). The crucial clause appearing to distinguish cases in which a waiver is upheld from those in which the courts choose not to support the waiver includes a statement to the effect that, "the participant waives the right to sue even where the agency and/or its staff are found negligent." Only signed waiver forms have held up. Those found on signs, the backs of ski lift tickets, etc. have not been supported to date. The downhill ski industry is beginning to get around this limitation by requiring season ticket purchasers to sign a waiver as a condition of purchasing their seasons pass. Another limitation of waiver forms is that they have not, as yet, been supported where a child plaintiff has been injured. These limitations must be kept in mind: Waivers should form part of a risk management strategy; they should not be the agency/leader's entire risk management strategy.

What To Do?

In the event that an individual is injured over an outdoor program, there are a number of specific actions the leader should take to minimize the potential for the individual to launch a negligence lawsuit and/or for such a lawsuit to be successful should it be initiated. These steps are as follows:

Care for the Victim

People don't sue their friends. If the injured individual is treated with care and dignity, there's a good chance they won't haul the leader and agency into court.

Employ a Scribe

Someone should be assigned to take notes -- copious quantities of them. Everything done at the scene should be recorded and pictures or video should be taken. These collectively are a preferred substitute to fuzzy memories trying to reconstruct the event, the steps taken, and their net effect.

Contact Agency Director

The boss will not be happy to learn about an accident through the media or some other public source. In addition, once notified, he or she will know how to contact the agency insurer and lawyer and will initiate these steps. The leader may want to contact his or her own lawyer, of course.

Avoid Contact With the Media

Public admission of negligence could be a very serious action, affecting the agency and leader's legal standing and potentially also the ability of the injured participant to access the agency's insurance. Many insurance policies include clauses which preclude payouts where responsibility or negligence is prematurely confessed. This is an "OOPS" to be refrained from at all costs.

Settle Out of Court

In long drawn out cases, the only people to win are the lawyers. Yes, they're nice people, but... Attempt to resolve the issue through negotiation, before it ends up before the judge.

Recommendations

If I could summarize the three most effective actions an outdoor leader and/or program delivery agency can take to reduce the potential for accidents and resulting lawsuits, they would be the following:

1. Develop a comprehensive risk management plan. Be systematic. Establish emergency procedures and adhere to them in the event of an accident.

2. Ensure the program is covered with liability insurance. *Accidents will happen* and the outdoor leader and agency cannot always rely on waiver forms to protect them.
3. Employ waiver forms as part of the risk management program. They do, in general, help to transfer assumable risks to adult participants. Learning to assume responsibility for oneself is a reasonable objective of outdoor recreation programs. However, the use of waivers is not a license to run a shoddy operation. It should be considered as one brick in the risk management wall; not as the entire foundation.

Integrating these principles in program policy and day to day operations can go a long way to helping the program director and staff sleep soundly at night. Good luck and good programming.

Glenda Hanna, Ph.D. is an Assistant Professor of Outdoor Environmental Leadership in the Department of Physical Education Leadership and Sport Studies at the University of Alberta. She is the recent author of Outdoor Programming Pursuits: Legal Liability and Risk Management.

James Moss is Denver area trial attorney specializing in recreation risk issues.

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